

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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THE GENERAL HOSPITAL CORPORATION and )  
DANA-FARBER CANCER INSTITUTE, INC., )

Plaintiffs, )

v. )

ESOTERIX GENETIC LABORATORIES, LLC, )  
and LABORATORY CORPORATION OF AMERICA )  
HOLDINGS, )

Defendants. )

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Civil Action No.  
1:18-cv-11360-IT

BEFORE THE HONORABLE INDIRA TALWANI, DISTRICT JUDGE

MOTION HEARING BY VIDEOCONFERENCE

Thursday, May 26, 2022  
3:42 p.m.

John J. Moakley United States Courthouse  
Courtroom No. 9  
One Courthouse Way  
Boston, Massachusetts

Robert W. Paschal, RMR, CRR  
Official Court Reporter  
rwp.reporter@gmail.com

**A P P E A R A N C E S**

On behalf of the Plaintiffs:

BARCLAY DAMON LLP  
BY: CAROLYN M. CROWLEY  
160 Federal Street  
10th Floor  
Boston, MA 02110  
(617) 274-2900  
ccrowley@barclaydamon.com

On behalf of the Defendants:

KELLEY DRYE & WARREN LLP  
BY: ROBERT I. STEINER  
3 World Trade Center  
175 Greenwich Street  
New York, NY 10007  
(212) 808-7800  
rsteiner@kelleydrye.com

**P R O C E E D I N G S**

(In open court at 3:42 p.m.)

THE DEPUTY CLERK: United States District Court is now in session, the Honorable Judge Indira Talwani presiding.

This is Case Number 18-cv-11360, The General Hospital Corporation, et al., versus Esoterix Genetic Laboratories, LLC, et al. Will counsel please identify themselves for the record.

MS. CROWLEY: Good afternoon, Your Honor. Carolyn Crowley of Barclay Damon for the plaintiffs, The General Hospital Corporation and Dana-Farber Cancer Institute.

THE COURT: Good afternoon.

MR. STEINER: Good afternoon, Your Honor. Robert Steiner from Kelley Drye & Warren for Esoterix Genetic Laboratories and the Laboratory Corporation of America Holdings.

THE COURT: Good afternoon.

So we are back where we were a couple years ago, I think. And I have defendants' motion to dismiss. So I tend to start with the moving party and go back and forth.

MR. STEINER: Thank you, Your Honor, if I may.

If I could just say a few words about the First Circuit decision, because I think it does inform the remaining claims and whether or not they can survive. And, obviously, it's our view, and as stated in our papers, that

1 in light of the First Circuit's decision, the remaining  
2 claims can't survive.

3 The First Circuit, Your Honor, concluded that, by  
4 its terms, the parties -- and this is a quote -- "manifestly  
5 intended to enter into a release that broadly discharged all  
6 claims and demands, whether known or unknown."

7 THE COURT: Then, why did they vacate the other  
8 cause of action and send it back to me? Why not just wrap it  
9 all up?

10 MR. STEINER: That certainly would have been  
11 easier, Your Honor, and that would have been our preference,  
12 but --

13 THE COURT: But it's not what they did.

14 MR. STEINER: It is not, and they did not reach  
15 those issues. They sent it back to Your Honor for  
16 consideration; however, the decision by the First Circuit, I  
17 think, is instructive and informative in terms of how  
18 Your Honor analyzes the remaining claims.

19 THE COURT: Well, don't I -- when the question is  
20 what their manifest agreement was, isn't it the case that  
21 what the First Circuit was talking about and the only thing  
22 that the First Circuit was talking about was what did the  
23 release say?

24 MR. STEINER: The First Circuit, yes, talks about  
25 what the release said, but it also excluded other things.

1           THE COURT: It excluded -- it excluded all of the  
2 other things because, in contract law, one only looks at the  
3 contract terms. So the First Circuit said, "Our job is  
4 limited to the words of the contract, and the contract -- the  
5 words of the contract manifestly say X."

6           MR. STEINER: That's correct.

7           THE COURT: That's all they did, but it didn't -- I  
8 mean, I understand that that language sounds really broad and  
9 would knock everything out. But if you ask the First Circuit  
10 whether that's what they meant by that, I mean, it's  
11 completely inconsistent with remanding it on the other  
12 things. All they were talking about was the contract claim.

13          MR. STEINER: Well, let me -- let me, then,  
14 address, Your Honor, the specifics of the claims.

15          THE COURT: Okay.

16          MR. STEINER: And I'll start with the breach of the  
17 duty of good faith and fair dealing claim. Now, plaintiffs'  
18 brief -- and this is on page 9 -- they claim that by seeking  
19 to impose an obligation under the duty of good faith and fair  
20 dealing -- they quote -- "don't seek to impose obligations  
21 that conflict with the settlement agreement."

22          THE COURT: So I -- am I correct that there are two  
23 different contracts that are part of this whole dispute?

24          MR. STEINER: That's correct, Your Honor. There's  
25 a license agreement and a settlement agreement.

1 THE COURT: Okay. And every contract has an  
2 implied covenant of good faith and fair dealing. Which  
3 contract's implied covenant of good faith and fair dealing  
4 are we discussing, in your view, in this cause of action?

5 MR. STEINER: Well, my view -- in plaintiffs' view,  
6 they're talking about the license agreement. That's what  
7 they've made very clear, that they're talking about the  
8 implied covenant of good faith and fair dealing as it relates  
9 to the license agreement.

10 THE COURT: Okay.

11 MR. STEINER: But Your Honor needs to look at the  
12 relationship of the parties as manifested by the contracts  
13 between them, and that is both the license agreement and the  
14 settlement agreement, and you can't read one without the  
15 other. So if you impose an obligation under the license  
16 agreement that is clearly inconsistent with the settlement  
17 agreement, then you're imposing contractual terms that are  
18 inconsistent with what the parties intended in and contracted  
19 for.

20 THE COURT: No. So here's the -- here's why I  
21 think that the analysis goes somewhat differently than that.  
22 I think you have two different claims, and you have two  
23 different causes of action, so two different contracts and  
24 two different causes of action.

25 The contract, breach of contract, is that the --

1 they failed to pay the amount due in the license agreement.  
2 And the First Circuit says, no, because you have this second  
3 contract, and they paid you in accordance with the second  
4 contract.

5 And the plaintiff says well, but we -- you're not  
6 supposed to do things to deprive us of the benefit of our  
7 bargain. We have a -- we have a contract, and the implied  
8 covenant of good faith and fair dealing isn't just, like,  
9 another way of saying the contract. The implied covenant of  
10 good faith and fair dealing says, in addition to the contract  
11 terms, there's a further duty to not inter- -- to not take  
12 steps to fire -- to take away people's right to the benefit  
13 of their bargain.

14 So the case, right, where it makes out originally  
15 in Massachusetts, you -- I haven't read it in a long time,  
16 but *Fortune*, right? The employee is fired. He's an at-will  
17 employee. He's allowed to be fired, but they said, well,  
18 wait a minute. You fired him right before something vested  
19 so that you couldn't get the benefit of what was vested.  
20 That's what you were doing there, and you couldn't do that.  
21 It didn't mean you couldn't fire him, but you breached the  
22 other part of it.

23 I mean, that's -- so why -- why is the fact -- it  
24 may be that this doesn't breach the implied covenant of good  
25 faith and fair dealing. That's going to be a question later.

1 But why can't they allege that at this point based on what  
2 happened here even though the First Circuit says, yeah, but  
3 that contract, we're enforcing that contract and that -- or  
4 we're looking at that contract, and you don't have a breach,  
5 but --

6 MR. STEINER: But they can't allege it here. They  
7 don't make out a plausible claim here, because the covenant  
8 can't apply where we have exercised an express contractual  
9 right. And the expressed contractual right that we have  
10 exercised is to not pay the past royalties, and that --

11 THE COURT: So the -- but the express contractual  
12 right you exercise was under which contract?

13 MR. STEINER: The -- was under the settlement  
14 agreement.

15 THE COURT: Okay. And so you wrote a settlement  
16 up. A settlement agreement was written up which had an  
17 effect on the other contract. You may be allowed to -- that  
18 contract, they asked me to enforce it. I said I'm enforcing  
19 it. I was wrong. I can't enforce that contract, but that  
20 doesn't mean it was okay for you to negotiate that. I don't  
21 see where I'm any different than I was the first time around  
22 when I denied the motion to dismiss on this ground.

23 MR. STEINER: I think it's different, Your Honor,  
24 and I re-read Your Honor's decision, obviously. And I think  
25 you denied the motion originally because you said that we had



1       breached the license agreement and that there was this other  
2       alleged conduct, and that's in your opinion. You say it's  
3       based on those two things, the breach of the license  
4       agreement and other alleged conduct.

5               But what the First Circuit has said is that we  
6       didn't breach the license agreement.

7               THE COURT: No, you didn't breach -- you didn't  
8       breach the release. That's what they said. There's no  
9       breach of the release. The release said you released all  
10      claims. That's what they analyzed.

11              MR. STEINER: But the release, Your Honor, was  
12      release of obligations under the license agreement; and so,  
13      therefore, we didn't breach the license agreement because we  
14      were released from those obligations. So there's no -- there  
15      can't be a breach of the release without some object of that  
16      release being impacted, and the object that was being  
17      impacted by the release were the obligations under the  
18      license agreement.

19              So you need to have both, because if you impose an  
20      obligation of good faith and fair dealing that, essentially,  
21      is what that contractual right is under the license agreement  
22      that the First Circuit says doesn't exist, then that's  
23      contrary to the agreement of the parties. One can't be --

24              THE COURT: Well, you know what? Ms. Crowley, let  
25      me have you take that up there.

1 MS. CROWLEY: Sure. So the way we're looking at it  
2 is the same way Your Honor's looking at it. The implied  
3 covenant claim is not alleging a breach of the settlement  
4 agreement. The implied covenant claim is focused on the  
5 license agreement, and you're right, the First Circuit did  
6 not say anything about a breach of the license agreement.

7 The claim here is all about the defendants' lack of  
8 good faith or bad faith in the performance of the license  
9 agreement. The issue is not whether the defendants abided by  
10 the letter of the contract in the course of performance, and  
11 I think that's my brother's argument. His argument is  
12 focused on whether they abided by the letter of the contract.

13 The issue here that we're focused on is the  
14 challenged conduct, that is the defendants' misleading  
15 conduct to induce the plaintiffs to execute the release in  
16 the settlement agreement and whether that conformed to the  
17 parties' reasonable understanding of the performance  
18 obligations. And here it did not.

19 So the facts are that the defendants engaged in  
20 release negotiations in bad faith during the performance of  
21 the license agreement -- the license agreement. It's focused  
22 on the license agreement.

23 THE COURT: Can I -- I haven't gone back and read  
24 the license agreement in a couple years, but do I recall  
25 correctly that the license agreement had provisions for both

1 defendants' own -- whatever this is -- a test and, also,  
2 royalty payments, that there were two different sets of  
3 payments?

4 MS. CROWLEY: There are. There's the two -- I  
5 think there's the direct and then there's the sublicense.

6 THE COURT: And the other lawsuit that was in front  
7 of Judge Burroughs involved a sublicense matter?

8 MS. CROWLEY: Correct.

9 THE COURT: And the sublicense matter, if the  
10 sublicensee had continued paying normally, there would have  
11 been a flow of royalty money to plaintiffs, correct?

12 MS. CROWLEY: Correct.

13 THE COURT: And by the sublicensee and the  
14 defendants' dispute, all of a sudden, the money that was  
15 going to come in as a royalty payment was coming in as a lump  
16 sum instead of under the course of the contract; is that  
17 correct?

18 MS. CROWLEY: That's correct.

19 THE COURT: Okay. Mr. Steiner?

20 MR. STEINER: I don't believe that is --

21 THE COURT: What's wrong with that understanding of  
22 the license agreement?

23 MR. STEINER: Because the suit under the license  
24 agreement related to QIAGEN selling things outside of what  
25 their rights were under the license agreement, that they were

1 selling tests for commercial purposes; and so, therefore,  
2 they were taking away what otherwise would have been a market  
3 that EGL had. The settlement of the dispute with QIAGEN,  
4 which was with MGH's consent, as was memorialized in the  
5 settlement agreement, was for QIAGEN to pay a lump sum  
6 payment in settlement of that issue; and then as part of  
7 that, QIAGEN also got a fully paid-up U.S. license.

8 THE COURT: Okay. And that fully paid-up U.S.  
9 license meant that plaintiffs were no longer getting a stream  
10 of royalty; they were instead going to get a portion of this  
11 fully paid-up license.

12 MR. STEINER: Well, the settlement agreement  
13 doesn't divide -- the settlement agreement between EGL Lab  
14 Corp. and the plaintiffs doesn't specify that specific  
15 provision. You know, our view under the license agreement --

16 THE COURT: Well, let me just -- hold on. Let me  
17 just make sure I'm understanding this.

18 The reason that there was money coming from the --  
19 I'm sorry; I can't get their name --

20 MR. STEINER: QIAGEN.

21 THE COURT: QIAGEN. The reason there was money  
22 coming from QIAGEN may have been for various different bad  
23 things, but the claim that plaintiffs here had for a chunk of  
24 the money was saying, "Well, now you're giving them a paid-up  
25 license, so we want our portion of that," correct?

1 MR. STEINER: No, Your Honor. That's not right.

2 THE COURT: Okay.

3 MR. STEINER: And I explained it in two ways. A,  
4 they, obviously, filed no complaint and never articulated a  
5 claim. Under our view of the license agreement, of the --

6 THE COURT: They didn't articulate a claim, but you  
7 couldn't do any of this without their agreement, so it  
8 doesn't -- I mean --

9 MR. STEINER: Well --

10 THE COURT: -- this wasn't just gratuitously given  
11 to plaintiffs.

12 MR. STEINER: No, but if Your Honor will just let  
13 me explain the dynamic of what the plaintiffs were entitled  
14 to, based on the claims that were being made in the QIAGEN  
15 case. The plaintiffs were entitled to 8 percent of the  
16 settlement amount less legal expenses paid.

17 Now, without getting into the math of that, that  
18 number was well below the number that we ultimately paid them  
19 in this settlement agreement. There were negotiations back  
20 and forth as to -- as there are in any, you know, commercial  
21 relationship between the Lab Corp. parties and the MGH  
22 parties where there was a resolution of that -- of that  
23 dispute --

24 THE COURT: Of which dispute?

25 MR. STEINER: -- all wrapped up into one.

1 THE COURT: What dispute was resolved?

2 MR. STEINER: The dispute as to how much MGH and  
3 DFCI were entitled to of the QIAGEN money.

4 THE COURT: Okay. Got it. So that's how much they  
5 got. And that was resolving all of the QIAGEN matters. The  
6 agreement was then written to say, oh, and there's this whole  
7 other stream of money that's coming, the license fee, and a  
8 part of that money is now going to not go to MGH. That was  
9 the resolution, even though that wasn't the subject of the  
10 dispute. What was the subject of the dispute was the  
11 QIAG- --

12 MR. STEINER: QIAGEN.

13 THE COURT: -- QIAGEN litigation.

14 MR. STEINER: The parties negotiated, Your Honor, a  
15 resolution to their disagreement, and that's what you see,  
16 frankly, in my May 27th e-mail, is you see Mr. Eisenstein  
17 sends an e-mail and says, "We want you to do all of these  
18 things."

19 And my response, if you read the e-mail, is  
20 basically, "Look, you can't withhold consent. You have an  
21 obligation under the license agreement to consent to this  
22 settlement. And you are, frankly, acting in bad faith by  
23 withholding consent to this settlement agreement. And we can  
24 work it out amongst ourselves after this what the terms of  
25 any resolution are between us."

1           That's what the e-mail says. The e-mail doesn't  
2       say we're going to pay you ongoing royalties. It doesn't say  
3       anything about paying past royalties. It doesn't say  
4       anything about a lot of things that ultimately end up in the  
5       settlement agreement.

6           And, in fact, there are things that are demanded in  
7       Mr. Eisenstein's e-mail that never ended up in the settlement  
8       agreement, which just shows that there were more and further  
9       negotiations. And as to this -- this argument, Your Honor,  
10      that somehow we or I, you know, duped MGH and DFCI into  
11      signing a settlement agreement, I think there are a couple of  
12      points that need to be made.

13          First, you know, going back to the First Circuit's  
14      opinion, the First Circuit does say the breadth of the  
15      release was, obviously, by choice of the contracting parties.  
16      The First Circuit does say that that should be respected,  
17      especially where people are represented by counsel. So that  
18      decision by the First Circuit is important in that regard.

19          THE COURT: I just keep coming back to what the  
20      First Circuit's eyes on the ball were, was only the contract  
21      language of the release. That's what they were interpreting.  
22      That's what they decided. That's what they reversed me on.

23          They did not reverse me -- they did not say to me  
24      and now remand -- deal with all of these other things.  
25      Dismiss all these other things. They did not say you're

1 done. They said, really, the opposite. They said we're  
2 remanding for the open claims, and the one claim that I said  
3 was moot, that one, they reopened.

4 MR. STEINER: Your Honor, so if I could just  
5 continue on the good faith and fair dealing claim for just  
6 another moment, the --

7 THE COURT: What I'm actually really more  
8 interested in -- and maybe it comes back, again, to the good  
9 faith and fair dealing at the end -- I am actually more  
10 interested in the mistake argument for now and whether there  
11 was a mistake or wasn't a mistake. So it all sort of ties  
12 back in some ways here, and maybe I'm going to put the hot  
13 seat here on Ms. Crowley.

14 How is there a mutual mistake?

15 MS. CROWLEY: Sure.

16 THE COURT: I understand your arguments for  
17 unilateral, but what are your arguments, really, for future  
18 mistake? I think Mr. Steiner is very clear that they  
19 understood what they were doing every step of the way, and  
20 you've sort of alleged that.

21 MS. CROWLEY: Yes, Your Honor. So let me just,  
22 too, make one point before I turn to that. I did just want  
23 to point out, too, that the defendants argued to the  
24 First Circuit that the reformation claim, the dismissal  
25 should be affirmed on the merits. Their reply brief to the



1 First Circuit argued that the First Circuit could affirm on  
2 any grounds, and the First Circuit declined to do that.

3 THE COURT: Yeah, but they always do. I can't go  
4 too far on that. The First Circuit will take the argument,  
5 and they're respectful of our role in that regard in that  
6 they really -- they don't want to save you the time and just  
7 say let's jump to it. They'll give it back to me.

8 So I understand they presented it there, but the --  
9 that's not at all surprising to me that the First Circuit  
10 said let's take a look at it. But if you could address the  
11 mutual mistake, because I don't -- I don't really see how  
12 that squares with your allegations.

13 MS. CROWLEY: Sure. And so we do have the  
14 unilateral mistake, the fact of, well, they knew, and we did  
15 know. In a sense, to use Mr. Steiner's words, we were duped.

16 So the plaintiffs do also allege that the  
17 defendants didn't know of the mistake at the time such that  
18 at the time the settlement agreement was signed, the  
19 defendants also mistakenly understood that the release didn't  
20 cover the royalty payment. It only --

21 THE COURT: Well, what's -- I mean, that's, really,  
22 kind of a conclusory allegation, isn't it?

23 MS. CROWLEY: Well, Your Honor, I would say we've  
24 also alleged that, to the extent that there was going to be a  
25 release of this large sum of money, it would have been

1 discussed. And we've alleged that they asked for it. We  
2 said no. And we moved forward. And the statements are,  
3 okay, we're only going to look at the issue of how to divide  
4 the settlement proceeds.

5 So at the time, the parties are looking at it the  
6 same way. That issue is in the past. We're only looking at  
7 how to divide the settlement proceeds. But they realize it  
8 later, is the allegations that we've made on the mutual  
9 mistake.

10 THE COURT: I guess I'm still not -- I understand  
11 your unilateral mistake argument. I'm still not  
12 understanding the mutual mistake argument.

13 I mean, there -- there's no -- there certainly was  
14 a statement saying we're not dealing with this, but then  
15 negotiations continued, and the language was grafted, and you  
16 don't have anything that would suggest that the defendants  
17 didn't know what they were doing when they put that  
18 release -- I mean, is the -- you don't have any allegations  
19 as to -- that would suggest they didn't know what they were  
20 doing when they put that release together.

21 I mean, somehow, the dollar -- money was bridged.  
22 There was a dispute. You were very far apart on dollars, and  
23 somehow it was bridged, and I don't have any reason to not  
24 think well, they were bridging it by thinking, well, if we  
25 have a release, we don't have to pay that.

1 MS. CROWLEY: Perhaps, but they may also have been  
2 thinking in the same mindset as us, that, of course, it  
3 didn't cover that; but then when the payment came due, they  
4 looked and thought, "Oh, we don't have to make that payment."  
5 So at the time, we were both on the same page. We were only  
6 looking at how to divide things and not looking at this  
7 issue; and, after the fact, they realized it.

8 THE COURT: Mr. Steiner, if this case goes forward,  
9 how will we be dealing with the fact that you are the  
10 percipient witness here?

11 MR. STEINER: We have actually looked at that,  
12 Your Honor, under Massachusetts law. I'm not prepared to  
13 give you the chapter and verse on that, but we're comfortable  
14 that we can work around that. But that is an issue that came  
15 up initially in the retention of this case, so I don't want  
16 you to think that we just ignored it.

17 But if I could just respond to counsel's argument.  
18 You know, this really is on all fours with the *Eck* case. The  
19 *Eck* case, you know, even if you accept the facts as pled,  
20 would say that even if both parties didn't contemplate  
21 something in a release, the legal effect of that release is  
22 the same. And so --

23 THE COURT: Isn't there a difference -- I mean, it  
24 is -- it is typically the case that what you are bargaining  
25 for in a release is things that nobody has thought of. And

1 so that's what that case is dealing with. There is an  
2 agreement to cover things that nobody has thought of.

3 But that's a different thing than saying we are  
4 also covering things that are known things, and there's just  
5 a disagreement as to whether this language covers it or not.

6 MR. STEINER: Well, two points on that, Your Honor,  
7 so -- and I think Massachusetts law is very clear on  
8 releases, that if you want to exclude something from a  
9 lease -- release, you need to specifically say it.

10 THE COURT: Well, that's why they're going to lose  
11 on the express contract interpretation, but this isn't an  
12 express contract. This is a mistake question. So --

13 MR. STEINER: And --

14 THE COURT: -- I own -- I own three cars, and we  
15 have a negotiation for me to sell you two cars, and I don't  
16 mention the third car because none of us are talking about  
17 it, and I say I'm going to sell my cars. That express  
18 language is cars. It's all your cars.

19 But that isn't what I meant and that -- that is a  
20 mistake, and it's a mistake on my part only. And if you  
21 didn't know that I was making that mistake, it goes nowhere.

22 MR. STEINER: That's right.

23 THE COURT: But if you had a reason to know about  
24 it, then isn't that what unilateral mistake is about?

25 MR. STEINER: It is, Your Honor, but then I go back

1 to their pleading, and their pleading specifically says that  
2 this was never discussed. They, in fact, say -- I think it's  
3 in paragraph 66 -- that they simply assumed that the release  
4 wouldn't cover these types of claims.

5 Your Honor, I think the -- I don't think we make a  
6 large point of it, but we cite in our brief, the *Rohm & Hass*  
7 case is -- actually addresses all three of the claims here:  
8 the good faith and fair dealing claim, the 93A claim, and the  
9 mistake claim. And it is in the context of a preliminary  
10 injunction, but the Court evaluates those claims where a  
11 party actually inserted at the last minute a contractual  
12 term. And the other side signed it without realizing it.

13 And in the *Rohm & Hass* case, basically, what they  
14 say is that you should have read the agreement. You should  
15 have read the agreement and understood what it meant. You  
16 can't use the language of mistake to create obligations that  
17 don't exist or to shift the risk of your -- your alleged lack  
18 of understanding to the other side.

19 And that's where, again, I get back to this idea:  
20 They are represented by counsel. There is a merger clause in  
21 the agreement. There's a clause that says you're relying on  
22 your counsel for their -- for their advice. So for them to  
23 come back now and say, "Well, we just assumed that this  
24 release wasn't going to cover these claims," that is not a  
25 basis to claim mistake.

1 THE COURT: Well, they're not saying, "We just  
2 assumed." They're saying you said to them, "Okay. Then the  
3 only things up are these other things." They're saying  
4 that's what you said to them.

5 MR. STEINER: Well, a couple of points on that.  
6 "A" is that -- they actually say in the -- in the agreement,  
7 it was never discussed. So --

8 THE COURT: Well, but they also say that you said  
9 that -- that you asked to do a license, they said no, and  
10 then you said we're not talking about anything other than  
11 this other stuff.

12 MR. STEINER: Your Honor, much like if you were --  
13 the e-mail that is -- that is cited, which is Exhibit J, it  
14 just doesn't say what they say it says. And much like when  
15 we're analyzing a contract, you would look at the contract  
16 and see what does it say.

17 If you read the last paragraph of my e-mail, it  
18 says if no agreement is possible after that meeting, I  
19 suppose Lab Corp. and MGH can mediate or litigate the dispute  
20 between them. What cannot happen is that the withholding of  
21 consent terminates the best and only settlement available.  
22 That's what I was talking about.

23 And there's no contemplation here of even having an  
24 agreement. What this e-mail exchange is about is you need to  
25 give consent, and then we can work it out between ourselves

1 afterwards what happens next.

2 And that's obvious by Mr. Eisenstein's e-mail to  
3 me, because he lists all of these things that they want, half  
4 of which don't even end up in the settlement agreement. And  
5 so, you know, it's no more of a mistake that the -- that  
6 the -- the patents weren't put, according to his e-mail, on a  
7 Track 1 application and that we didn't ratify our commitment  
8 to fund ongoing EU opposition than it is a mistake that they  
9 signed a release which discharged us of obligations under the  
10 license agreement.

11 If they had come to Your Honor and said, "Oh, it  
12 was a mistake because Mr. Steiner agreed to, basically,  
13 everything we were saying in the May 26th e-mail; and so,  
14 therefore, Lab Corp. needs to authorize a Track 1 patent  
15 application and needs to pay for, you know, continued  
16 funding," Your Honor would say, "Well, where is that in the  
17 agreement?"

18 THE COURT: But all you're convincing me of,  
19 Mr. Steiner, is that you felt it was really, really unfair  
20 that they held -- withheld consent and that you didn't like  
21 the dollar amount. And so you got this agreement, and if you  
22 needed to sneak something by them elsewhere, maybe that's  
23 what happened. You're not convincing me that that other  
24 thing was or wasn't part of the deal.

25 MR. STEINER: Your Honor, there's no sneaking

1 anything by MGH and DFCI and their in-house and outside  
2 lawyers and --

3 THE COURT: So you were fully aware -- so the idea  
4 of mutual mistake is you were fully aware that this is what  
5 was contemplated at all times? Is that what you're saying?

6 MR. STEINER: What I'm saying is what was  
7 contemplated was a broad, general release.

8 THE COURT: Including -- were you contemplating  
9 that they weren't going to pay amounts due under the license  
10 agreement?

11 MR. STEINER: Your Honor, I can't answer that  
12 question right now. I can't answer that question,  
13 because, A -- no, but, Your Honor, with -- no, seriously,  
14 what was contemplated was to get a broad general release of  
15 things that were known and unknown.

16 THE COURT: Were you involved in anything other  
17 than the -- this other litigation and resolving it? Were you  
18 involved in their ongoing licensing/business agreements?  
19 Maybe she's --

20 MR. STEINER: I don't know that there were ongoing  
21 licensing/business agreements between them.

22 THE COURT: Well, there was an ongoing agreement.  
23 I mean, I feel like that's kind of the thing that's kind of  
24 silent in the First Circuit's decision, is there's an  
25 ongoing -- there still is an ongoing relationship between the



1 parties.

2 MR. STEINER: We pay licensing fees.

3 THE COURT: This is not a release that people  
4 normally sign and walk off forever and have nothing to do  
5 with each other. These are businesses that are in business  
6 together.

7 MR. STEINER: That's correct. And they -- and  
8 so -- and under the terms of the license agreement -- I'm  
9 sorry -- under the terms of the settlement agreement -- and  
10 there hasn't been any argument because we've been paying the  
11 money -- we were paying royalties on a go-forward basis. But  
12 the settlement agreement clearly says, in no -- in no  
13 uncertain terms, that we do not have to pay past royalties.

14 THE COURT: A matter -- it's not the past -- it's  
15 not the past royalties. It's the past license fees, right?  
16 They're different things. Am I --

17 MR. STEINER: Sorry. Maybe I'm not following,  
18 Your Honor. They are -- they are -- license fees, royalties  
19 are amounts that are owed under the license agreement.

20 THE COURT: But they are amounts owed under the  
21 license agreement for Esoterix's own sale of the -- of the  
22 test or whatever this device was. The amount that's coming  
23 here is different. It's something qualitatively different  
24 than what was at issue in the other litigation.

25 MR. STEINER: I believe, if I'm understanding

1 Your Honor's question correctly, yes, that is right.

2 THE COURT: Okay. I've asked you about  
3 unilateral -- about mutual mistake. On the unilateral  
4 mistake, Mr. Steiner, maybe let me ask you this question:

5 Assuming I find that the facts are sufficiently  
6 alleged that plaintiffs were unaware of the mistake they were  
7 making, that they were making a mistake, they did not intend  
8 to give up the license fee and they made a mistake, is it  
9 your contention that the allegations are insufficient as  
10 to -- that you should have known that they were making a  
11 mistake?

12 Do you have any reason to suggest that, other than  
13 they're good lawyers and they should have read the agreement,  
14 do you have any reason to challenge the allegations? I mean,  
15 the allegations are the allegations. I'm not asking you to  
16 challenge them factually, but do you have any reason to say  
17 the facts aren't sufficiently alleged to say that it is  
18 their -- that they didn't know it, but you believed that you  
19 had reason to know that they didn't -- that they didn't  
20 realize the mistake?

21 MR. STEINER: I would point Your Honor to  
22 paragraphs 29 and 66 of the complaint. In both of those  
23 paragraphs, they admit that the issue of past royalties was  
24 not discussed and that they simply made an assumption. And I  
25 think those paragraphs take them out of any contention that

1 we knew that somehow they were proceeding under this mistaken  
2 belief.

3 THE COURT: Ms. Crowley, what's your response to is  
4 that?

5 MS. CROWLEY: If I may, Your Honor, paragraphs 29  
6 and 66 are all about what we discussed earlier, how the  
7 defendants had asked to not have to make those payments, and  
8 we said no. And then they reference Exhibit I. That's the  
9 e-mails. We're now going forward. The only issue is how to  
10 divide up the settlement proceeds. They don't say what  
11 Mr. Steiner is saying they say.

12 THE COURT: Okay. All right. Let me just go  
13 through my notes here and the questions that I have.

14 Ms. Crowley, you may have already answered this,  
15 but your response to Mr. Steiner's argument that where the  
16 First Circuit has said you can't rewrite the bargained for  
17 arrangement using implied covenant of good faith and fair  
18 dealing -- sorry.

19 The First Circuit said that you're sophisticated  
20 entities, negotiated the release with the benefit of counsel,  
21 you can't rewrite it. What's your response to his argument  
22 that, in seeking to enforce the implied warranty of good  
23 faith and fair dealing, that's exactly what you're trying to  
24 do, is rewrite the bargained for arrangement?

25 MS. CROWLEY: Because we're not, Your Honor,

1 because, one, that language is specific to the contract. And  
2 what the plaintiffs are alleging here and have sufficiently  
3 pled is that it's the misconduct in the lead-up to the  
4 execution of release. It's all the things we've just talked  
5 about. It's the ask for the paid-up license. It's the  
6 denial of that. It's the moving forward with just dividing  
7 up the settlement proceeds. It's all the conduct leading up  
8 to the execution of the release.

9 THE COURT: Why wouldn't -- I mean, you know, I  
10 sort of think about when there's -- forget about release for  
11 a minute, but simply contract modifications. Why wouldn't  
12 anybody be able to argue, any time there's a contract  
13 modification that they don't like, that it violates the  
14 spirit of the original contract? Because it kind of does,  
15 right? You come back in, and you say now you're going to get  
16 less money.

17 MS. CROWLEY: I think because it's fact specific,  
18 because it's -- here, it's the bad faith that we're focusing  
19 on. So it's not just -- it's not just "Oh, there's a  
20 contract modification. We're unhappy." It's what led to  
21 that contract modification. It's the bad faith.

22 THE COURT: So I sort of feel like some of these  
23 implied covenant cases, that they really sort of go into --  
24 you know, what you'll often see is you have a breach of  
25 contract; and on top of that, you have a breach of the

1 implied covenant of good faith and fair dealing that gives  
2 you a little bit more even than the breach of contract  
3 because of it.

4 But when you don't have the breach contract, can  
5 you really -- without the breach of contract, does the -- you  
6 know, it's one thing -- the example I gave the *Anthony's Pier*  
7 *Four*, I think there was no breach of contract. That didn't  
8 go very -- I don't think that was the focus of it. Although,  
9 as I said, I haven't read it in a while.

10 But does the implied covenant of good faith and  
11 fair dealing really breathe life into something in the face  
12 of not having an express -- in the face -- not just you can't  
13 really reach the contract, but, you know, you're contract  
14 claim kinds of goes the other way for you. And if so, where  
15 are the cases where I get that?

16 MS. CROWLEY: Sure, Your Honor. And so -- so I  
17 think that it can in specific circumstances. And if you look  
18 at page 8 of our opposition, we cited to the *Clinical Tech,*  
19 *Inc.* case. It's a District of Massachusetts case. It's  
20 192 F.Supp.3d 223. In there, the focus, again, was during  
21 the course of performance, and an implied covenant claim was  
22 allowed to survive summary judgment.

23 THE COURT: Despite the contract claim being  
24 denied?

25 MS. CROWLEY: Yes.

1           THE COURT: That's what I'm looking for, is where  
2 the contract claim fails and yet you can somehow -- rather  
3 than it simply being gravy to get you something more than the  
4 contract claim, which is, I think, where often it happens.

5           MS. CROWLEY: Right. No, this was something  
6 different. So not having that, the Court still found that  
7 this implied covenant claim could survive on summary judgment  
8 because of the representations that had been made during the  
9 course of the performance.

10           And I think, too, we also cited to the Restatement  
11 (Second) of Contracts, which, I think, makes this point well.  
12 It says, "Good faith performance or enforcement of a contract  
13 emphasizes faithfulness to an agreed common purpose or  
14 consistency with the justified expectations of the other  
15 party.

16           "The essential inquiry is whether the challenged  
17 conduct conformed to the parties' reasonable understanding of  
18 the performance obligations as reflected in the overall  
19 spirit of the bargain, not whether the defendant abided to  
20 the letter of the contract in the course of performance."

21           THE COURT: And do any of these -- do any of these  
22 go to, you know, what I'm now describing as a modification of  
23 the contract? I mean, I think that's -- I think that may be  
24 the problem for you on the implied covenant, is that while  
25 you can't do things to take away the benefit of the bargain,

1 where you have now sanctioned it by signing on to the  
2 modification, can you really make the implied covenant  
3 argument?

4 MS. CROWLEY: I think you can under the *Clinical*  
5 *Tech* case.

6 THE COURT: And, Mr. Steiner, I assume that's  
7 exactly -- what I'm just saying now is what you were saying  
8 earlier, is that if you have signed off on contract, you  
9 can't have -- you've signed off on the new contract, you  
10 can't have the implied covenant for denying you the bargain  
11 of the old contract?

12 MR. STEINER: That's correct, Your Honor, unless it  
13 creates an inconsistency. And I'm glad counsel cited to the  
14 *Clinical* case, because I was actually just going to do that  
15 when it became my turn.

16 What you heard is it's all the conduct leading up  
17 to the execution of the settlement agreement that forms the  
18 basis for their good faith and fair dealing claim, but the  
19 *Clinical* case actually speaks to that directly. It says,  
20 "The prohibition contained in the covenant applies only to  
21 conduct during performance of the contract, not to conduct  
22 occurring prior to the contract's existence, such as conduct  
23 affecting contract negotiations." And that's in the *Clinical*  
24 case.

25 And so -- and then it goes on to say --

1           THE COURT: No, no, no. But that's a different  
2 point. Hold on one minute there. Let's say you have only  
3 one contract. Anything else that happens before that  
4 contract is started is not covered by the implied covenant of  
5 good faith and fair dealing.

6           The question I was asking -- you're under the  
7 existing contract, and now you're negotiating to modify that  
8 existing contract. Is there a duty, an implied covenant of  
9 good faith and fair dealing, from the original contract that  
10 would somehow limit your ability to negotiate a new contract?

11           And I would -- I guess I would say to you,  
12 Ms. Crowley, it would seem to me the answer is yes, until the  
13 point when you sign it.

14           So if they come to you -- for example, you have  
15 a -- you have a lease of house, and it's a 12-month lease.  
16 And your landlord comes to you and says, I want to have  
17 you -- I want to negotiate the terms of the lease during the  
18 course of the lease, and you have to pay more than you're  
19 already paying. And if not, I'm going to make your life  
20 miserable. You're sort of interfering with the benefit of  
21 the bargain.

22           But a landlord comes to you and says, "I'll renew  
23 it for another year, but only if you agree to a higher price  
24 for the last two months." Can you do an implied covenant of  
25 good faith and fair dealing? I don't -- I'm afraid not, that



1 that -- once -- if they try to negotiate it and you don't  
2 agree with it, you can say they're trying to take away your  
3 bargain or they just implemented -- but once you sign on to  
4 it, can you still make that argument? And I don't know  
5 whether you're saying *Clinical Tech* is that example or not.

6 Mr. Steiner, you were saying that *Clinical Tech* was  
7 talking about negotiations for contract. But what I'm  
8 interested in is negotiations during the life of a contract  
9 for the next contract.

10 MR. STEINER: And I'm not sure whose turn it is.

11 THE COURT: Either one of you.

12 MR. STEINER: So I think the problem becomes -- and  
13 I think Your Honor has identified it -- is that once you  
14 enter into a new contract, then that is what defines the  
15 relationship between the parties.

16 And so if you have a contract, particularly where  
17 it's an integrated agreement, which we have here, that says,  
18 look, you no longer have these rights, and you've signed on  
19 to that, then the only way -- then that would extinguish any  
20 claim for the implied covenant of good faith and fair  
21 dealing, which would vary the rights that you have an  
22 absolute contractual right to exercise under the agreement  
23 that you signed.

24 And so it is simply impossible in this case --  
25 we're not talking about the spirit of the bargain in the

1 license agreement. What we're talking about is parties that  
2 negotiated an amendment, essentially a release of obligations  
3 in that license agreement, signed on to it with, again, the  
4 advice of counsel, with an integration clause, with a  
5 representation that they were relying on counsel. And now  
6 one party comes back and says, "We don't like the deal we  
7 struck. You misled us into signing this agreement, and we  
8 don't like it." And that would open up every contract --

9 THE COURT: Well, it wouldn't open up every  
10 contract if everyone understands what they're agreeing to, so  
11 that gets me back to mutual mistake, not implied covenant.

12 MR. STEINER: Well, I think everyone understands,  
13 you know, part of the reason we put these bells and whistles  
14 on some of these contracts, like integration clauses and  
15 reliances, is to avoid what we're arguing about here, which  
16 is, you know, "Don't rely on what I'm saying. Rely on what  
17 your lawyer is saying. Rely on the advice that your lawyer  
18 is giving you. Read the agreement."

19 And, again, that goes to the *Rohm & Hass* case where  
20 there was a restrictive covenant agreement. The parties  
21 entered into it, had a dispute; and then, ultimately, one  
22 party slipped in a provision -- actually slipped in a  
23 provision -- to extinguish the restrictive covenant  
24 obligation. And the Court said, well, look, I mean, you  
25 signed an agreement. You should have read it. You should

1 understand what it says. Your reliance is not reasonable.

2 THE COURT: Well, the question on mutual mis- -- on  
3 unilateral mistake isn't reasonable reliance, is it?

4 MR. STEINER: Well, the *Rohm & Hass* case does --  
5 does say that. It says sophisticated businesses modifying a  
6 contract are expected to read the documents submitted, and  
7 that's in the context of their discussion of the 93A claim,  
8 and it's in the context, I believe -- I actually may have --  
9 of the mistake claim in *Rohm & Hass* as well, is that you need  
10 to read the agreement before you sign it and not shift the  
11 risk of your alleged error to the counterparty.

12 THE COURT: Any response to that, Ms. Crowley?

13 MS. CROWLEY: Your Honor, I would go back to -- to  
14 what we were just talking about with regard to the implied  
15 covenant. It basically -- the argument is that you can't  
16 pull a fast one and say, "Oh, sorry, too bad. You signed a  
17 modification." So I think there is still this implied  
18 covenant claim that exists.

19 And the distinction too may be it's not a new  
20 contract. The license agreement is an ongoing agreement, and  
21 the settlement agreement here was a separate agreement. So  
22 it's -- it makes it factually different from the scenario  
23 that --

24 THE COURT: Well, they have used the settlement  
25 agreement as a modification of the license agreement, not as

1 a separate -- that's the way they are reading it.

2 MS. CROWLEY: Correct. Right. And we just don't  
3 see it that way. That was with regard to one specific issue.  
4 And here what they're saying is, "Oh, sorry. Too bad. You  
5 agreed to this modification, so don't worry about the fact  
6 that we violated the spirit of the license agreement and its  
7 terms."

8 THE COURT: Yeah, I am -- I hear the argument that  
9 this seems inconsistent with the spirit of an ongoing  
10 business relationship. Frankly, I find the whole dispute  
11 inconsistent with how I would think parties with an ongoing  
12 relationship would want to behave.

13 But that said, at this point, the fact that it  
14 seems to me a separate contract doesn't -- that's not the end  
15 of the day. The First Circuit has concluded that that  
16 language, by its express terms, extinguishes everything.

17 I mean, it's sort of an interesting thing where you  
18 have an ongoing relationship, because normally, when you have  
19 a release -- and I don't think there was a single sentence in  
20 the First Circuit's decision that was cognizant that there  
21 was an ongoing relationship. But normally, when you have a  
22 release, what you're trying to do is clean up everybody's  
23 mess and go your separate ways, not have an ongoing  
24 relationship.

25 But that's neither here nor there. I think the

1 problem -- and I will sort of go through it. I did feel like  
2 I had addressed the -- good faith and fair dealing the last  
3 time around, but I think this point of but if you have now  
4 signed off on it, even if what it was doing was impairing  
5 your rights, can you still bring a claim? -- and I will go  
6 look at the case law that you've all cited to me again and  
7 try to figure that out.

8 I remain focused on the unilateral mistake  
9 question. And maybe this is the last issue I want to address  
10 before we call it a day here. So under Massachusetts law, I  
11 believe that the requirement for proving unilateral mistake  
12 was that one party made a mistake. The party -- the other  
13 party knew or should have known of the mistake; in other  
14 words, they knew you were making a mistake. They didn't --  
15 or caused the mistake.

16 And I guess I would ask just whether you have any  
17 disagreement that that's -- those are the two things that you  
18 would have had to allege or that you have to prove if the  
19 case goes forward.

20 MS. CROWLEY: I think Your Honor has that correct,  
21 and I think that's what we have alleged.

22 THE COURT: Mr. Steiner, would you disagree that  
23 those are the elements that they needed to cover?

24 MR. STEINER: No, I think those are -- those are  
25 the basic elements that -- and I would just reiterate they

1 haven't pled those elements, certainly not plausibly; and, in  
2 fact, I think they've pled themselves out of those elements,  
3 because there had to have been a meeting of the minds that  
4 then, ultimately, wasn't memorialized in the agreement that  
5 we knew about and they didn't. And there's just no facts  
6 pled to support that.

7 THE COURT: Well, I guess that's always a funny  
8 thing. The -- and I find myself -- I find the case law a  
9 little bit confusing.

10 The meeting of the minds gets established once you  
11 signed off on that contract. So we're not having a  
12 conversation about meeting of the minds. The meeting of the  
13 minds is you both agree that that's the language you're going  
14 to sign, and you sign that agreement.

15 The reason you have a defense of or a claim about  
16 mistake is not arguing that there wasn't a meeting of the  
17 minds. The argument is that the meeting of the minds --  
18 i.e., this contract that you signed -- was based on a  
19 mistake, no?

20 MR. STEINER: Maybe that is a fair point,  
21 Your Honor. I understand the Court's distinction between  
22 that. But, again, I think there has to be -- the  
23 insurmountable obstacle they have, and they haven't presented  
24 any evidence of it, certainly haven't presented any evidence  
25 of it, is there was some communication between the parties

1 which evidences our knowledge of what they were thinking.  
2 And their allegations are the exact opposite of that. Their  
3 allegation is we assumed this, and it was never discussed.

4 MS. CROWLEY: That's not correct, Your Honor. Our  
5 argument isn't that it's assumed. And if you look at  
6 Exhibit I and the allegations that we made in paragraphs 29  
7 and earlier and 66, is that's they asked for this, and we  
8 said no, and we moved forward dealing with the only other  
9 issue, dealing with how to divide the settlement proceeds.

10 THE COURT: So how about -- what's the answer to  
11 the question of, when you saw the words "release" in the  
12 release, what you thought it meant?

13 MS. CROWLEY: Well, we -- so the plaintiffs  
14 acknowledge that they were entering into a release, but it's  
15 the impact of the release that's the mistake.

16 THE COURT: Well, no. If it's the impact of the  
17 release, that's just saying, you know, "I got an adjustable  
18 rate mortgage, and I didn't realize the rate was going to go  
19 up." That doesn't get you anywhere.

20 Isn't the -- I thought your argument was that you  
21 thought the release had to do with this dispute here and that  
22 you didn't think that the release was going to have to do  
23 with the other language. And so the question then is, if  
24 that is the mistake, how did they know that you agreed to  
25 this oblivious of the fact that, the following week, they

1 weren't going to send you the license fee?

2 MS. CROWLEY: For two reasons, because it was  
3 already taken off the table, and because if it was going to  
4 have been agreed to, it would have been discussed. So it was  
5 already agreed it was off the table. And if we were going  
6 to --

7 THE COURT: Okay. So let me -- this may not be the  
8 way it happened, but let's assume that -- give me a little  
9 bit of leeway here. People have a conversation, and they  
10 say, "These are the three things we want to talk about, and  
11 we agree to it." And then you exchange written drafts, but  
12 you're not talking anymore and you put something in the  
13 written draft, and the other side doesn't respond.

14 How can you -- can you say, well, they put this in  
15 there, but it wasn't what we were talking about? I mean,  
16 presumably you didn't talk about releases at all. You were  
17 just talking about two or three terms. So now you talked  
18 about the release, and I think what you're saying is, "We  
19 didn't -- they knew -- they knew that we couldn't be -- they  
20 had a plan to not pay a million dollars over there. They  
21 knew that didn't even occur to us that that was their plan."

22 And my question is what allegation do you have in  
23 the complaint to show that they knew that you didn't  
24 contemplate that extra million dollars and that you were  
25 mistaken?



1 MS. CROWLEY: Sure. And I think this -- this may  
2 answer it, Your Honor.

3 So at paragraph 72 of the third amended complaint,  
4 the plaintiffs allege that the defendants have reason to know  
5 of the mistake and that the defendants knew the plaintiffs  
6 originally thought they were entitled to twice as much as  
7 they ultimately received under the settlement agreement.

8 In addition, the plaintiffs allege that the parties  
9 never discussed releasing the royalty payment to the  
10 plaintiffs under the license agreement. And such reduction  
11 on the net proceeds payable to the plaintiffs had it been the  
12 objective intent, which it was not, would have been expressly  
13 stated in the settlement agreement, not silently or  
14 mistakenly incorporated in the general release provision.  
15 That's the allegations in 69 and 72.

16 THE COURT: Okay.

17 MR. STEINER: Your Honor?

18 THE COURT: Yes.

19 MR. STEINER: So, I mean, what -- what has happened  
20 there is that allegation, essentially, parrots the elements  
21 of the claim. It's not factual. But what is in there is,  
22 again, this idea that the issue was never discussed. And if  
23 the issue was never discussed, then there couldn't be any  
24 knowledge that we knew what they were thinking. And so, you  
25 know --

1           THE COURT: Well, I'm not sure if that follows, but  
2 I'll think about that.

3           MR. STEINER: But I -- I think, Your Honor, just  
4 one last point on the mistake issue, because I think what  
5 counsel did say and then you corrected the argument is we  
6 didn't understand -- "we" being MGH/DFCI -- didn't understand  
7 the impact that signing the release would have. The problem  
8 with that argument is it runs right into *Eck*. And that does  
9 not make -- that does not make a mistake, unilateral or  
10 otherwise.

11          THE COURT: Ms. Crowley, I'm going to give you the  
12 last word, and then we're going to call it quits here.

13          MS. CROWLEY: Sure. It's -- we discussed this  
14 point earlier, so I'll just be brief. It doesn't run right  
15 in the face of *Eck*, Your Honor.

16          THE COURT: Okay. I will go back and read some of  
17 these cases again and try to get something out sooner rather  
18 than later.

19          MR. STEINER: Thank you, Your Honor.

20          MS. CROWLEY: Thank you, Your Honor.

21          THE COURT: Thank you.

22          (Court in recess at 4:40 p.m.)  
23  
24  
25

**CERTIFICATE OF OFFICIAL REPORTER**

I, Robert W. Paschal, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing pages are a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 10th day of June, 2022.

/s/ Robert W. Paschal

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ROBERT W. PASCHAL, RMR, CRR  
Official Court Reporter